STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 10, 2013
v	No. 310850 Bay Circuit Court
MARK ALLEN BENNETT, Defendant-Appellant.	LC No. 10-010850-FH

Before: WHITBECK, P.J., and WILDER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals by leave granted his convictions of six counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a), and two counts of fourth-degree CSC (CSC IV), MCL 750.520e(1)(a). He was sentenced to prison terms of 95 to 180 months for the CSC III convictions and 16 to 24 months for the CSC IV convictions. We affirm.

I. BACKGROUND

Defendant had known the complainant's father for about 20 years. In January 2010, when the complainant was 14 years old, defendant asked both the complainant and her father if the complainant could babysit his son. Complainant's father approved. The complainant testified that once she began to babysit defendant's son, defendant initiated a sexual relationship with her. According to complainant, initially the two kissed and touched each, and the defendant touched her breast over her clothes. Subsequently, she and defendant began exchanging flirtatious text messages and nude pictures, then defendant touched her breast over and under her clothes, and she touched his penis over and under his clothes. Eventually, according to complainant, defendant performed oral sex on her, she performed oral sex on him, and after she turned 15 she and defendant had penile-vaginal intercourse on 5 occasions through August 2010.

According to the complainant, her parents became suspicious about her relationship with defendant sometime between February and May 2010. She said she lied to them about the sexual nature of their relationship because she was trying to protect defendant. Complainant's father testified that he even asked defendant to come to his house under the pretext of moving a dresser in order to confront defendant about his relationship with his daughter. Defendant assured him there was nothing going on between them. The complainant's mother testified that she thought it was wrong that her daughter had a crush on an older man and took her to see a

counselor, whom the complainant had seen on and off for chronic illness problems. The complainant said she did not disclose the extent of her relationship with defendant to her counselor.

The complainant testified that she "came clean" with her parents regarding the sexual nature of her relationship with defendant in September 2010. In mid-September, according to the complainant, she went to defendant's house with her parents in order to obtain an admission from defendant that they were involved in a sexual relationship. She said they told defendant that if he admitted to having sex with her, then that would be the end of it. The complainant said she never heard defendant admit anything but stated that she and her mother left his house and sat in their car while her father stayed and spoke with defendant. Her father testified that he spoke with defendant alone after the complainant and her mother left and that defendant said the complainant was not lying about the sexual relationship. The complainant eventually disclosed the relationship to the police. The complainant thereafter recorded a phone conversation between herself and defendant, which the parties refer to as the "pretextual phone call."

Defendant was arrested, and a police detective testified that he spoke with defendant at the Bay City Police Department on September 22, 2010, after reading defendant his *Miranda*[1] rights. A recording of defendant's interview, which was approximately 45 minutes in length, was admitted as an exhibit and played for the jury. The detective testified that during the interview, defendant admitted to all of the sexual penetrations they discussed. The detective estimated that they discussed "at least a dozen" instances. The detective also said that defendant discussed a conversation he had with the complainant's father, in which defendant admitted to having sex with the complainant.

Defendant testified multiple times at trial that he never had sexual contact or penetrations with the complainant, whom he believed to be 14 or 15 years of age. Defendant acknowledged that he and the complainant exchanged frequent text messages, which started to take on a flirtatious tone, but that for every nude picture she sent him, he sent her five or six text messages telling her to stop. He said he never sent the complainant a nude picture of himself, but he did state that he texted the complainant about random things, some of which was sexual. Defendant said that he and the complainant's parents discussed his relationship with the complainant in May 2010, but that he did not disclose the sexual nature of it and did not disclose that she had been sending him naked photos of herself.

Defendant acknowledged that the complainant and her parents also came to his house to talk about his relationship with the complainant. He said that, during this encounter, the complainant told him many times, "just admit this and it's over." He also said that after the complainant and her mother left, her father asked him if he was calling the complainant a liar, and that he said he was not calling anybody anything. During cross-examination, defendant later said he told her father "she's not lying."

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Defendant said that he knew that the police would be recording the pretextual phone call because the complainant told him that in advance. He said that the complainant told him during the call that she was pregnant and that he was the father. Defendant acknowledged he never said during the call that he did not know what she was talking about, and he explained that he did not deny having sex with her because he thought he would suffer no legal trouble if he went along with everything the complainant asked him to do. Similarly, defendant maintained that he told the police during the interview that he had sex with the complainant because "[t]hat's what she asked me to do." Defendant also testified that he made a telephone call after his police interview, during which he stated, "it's true" and that it happened "a bunch." This call was recorded and admitted as an exhibit at trial.

For the purpose of impeaching defendant's direct testimony, defendant was questioned concerning three separate clips from the recorded pretextual phone call which were played during the prosecution's cross examination of him. The first clip quoted defendant as stating to the complainant, "I told [your father] the truth in a roundabout way. Okay? What I told him was— he said, 'so was my daughter lying,' and I said 'no, she's not lying.'" In the second clip, the complainant stated, "[T]his is the part where I am 15. I don't know what to do, Mark," to which defendant responded, "Well, this is the part where I'm 37 and I know what to do." In the third clip, defendant discussed the elements and punishments for CSC III and CSC IV. The complainant then stated, "I should've just—oh, my God! I just wish I would've waited until I was 16 to have sex with you," to which defendant responded, "Yes, I know. How many times did I say that?" Defendant admitted that his voice was captured in the recordings, and he also admitted that he had looked up the law and knew he was in trouble before his police interview.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied the effective assistance of counsel in a number of instances. We disagree.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its rulings on questions of constitutional law are reviewed de novo. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). Because a *Ginther*[2] hearing was not held, "our review is limited to the mistakes apparent on the record." *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

"In order to obtain a new trial, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *Trakhtenberg*, 493 Mich at 51; see also *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "In examining whether defense counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that counsel's

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

performance was born from a sound trial strategy." *Trakhtenberg*, 493 Mich at 52; see also *Strickland*, 466 US at 690-691.

Defendant first argues that he was denied the effective assistance of counsel when his attorney failed to perfect an appeal by right. Because this Court granted defendant's delayed application for leave to appeal, the alleged ineffective assistance was harmless under the circumstances.

Defendant next argues that he was denied the effective assistance of counsel when his attorney declined to file a motion to exclude the pretextual phone call on the basis of entrapment by estoppel. Defendant asserts that the complainant was acting as an agent of the police and entrapped defendant by leading him to believe that he would not be prosecuted if he admitted to having a sexual relationship with her.

The defense of entrapment by estoppel "excuse[s] criminal conduct where a government agent has improperly instigated or encouraged the conduct." *People v Woods*, 241 Mich App 545, 555; 616 NW2d 211 (2000). Here, the complainant may have encouraged defendant to acknowledge the sexual nature of their relationship, but she did not attempt to encourage further criminal conduct for which he now stands convicted. Accordingly, defendant counsel cannot be deemed ineffective for failing to pursue a meritless course of action. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Defendant next argues that he was denied the effective assistance of counsel when his attorney declined to file a motion to exclude his police interview on the ground that his confession was involuntary and coerced. According to defendant, his confession was involuntary and coerced because he acted in reliance on promises from the complainant and her parents that he would suffer no legal trouble if he confessed.

"Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his or her Fifth Amendment rights." *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010); see also *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). "[W]hether a waiver of *Miranda* rights is voluntary depends on the absence of police coercion." *People v Daoud*, 462 Mich 621, 633, 614 NW2d 152 (2000), citing *Colorado v Connelly*, 479 US 157, 168; 107 S Ct 515; 93 L Ed 2d 473 (1986). "The test of voluntariness is whether considering the totality of all the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his capacity for self-determination critically impaired." *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997) (citation and internal quotation marks omitted). Furthermore, "[t]he Supreme Court has made clear that a defendant need not have a wise or shrewd basis for waiving *Miranda* rights for the waiver to be valid." *Daoud*, 462 Mich at 642, citing *Connecticut v Barrett*, 479 US 523, 525-526; 107 S Ct 828; 93 L Ed 2d 920 (1987). A waiver is "knowing and intelligent" if "the defendant understood 'that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him.'" *Daoud*, 462 Mich at 643-644, quoting *People v Cheatham*, 453 Mich 1; 551 NW2d 355 (1996).

The record establishes that defendant's confession was voluntary, knowing, and intelligent. His interview lasted approximately 45 minutes, and defendant makes no allegations of wrongdoing against the police detective who conducted his interview. He even admits that he planned to confess before the interview began. Even if it were true that defendant only confessed because the complainant and her parents told him he would not suffer legal consequences if he did, such evidence would show that his confession was not only voluntary, but calculated. That defendant miscalculated does not mean that his confession was involuntary or coerced.

Similarly, the record shows that defendant's confession was knowing and intelligent. Defendant was informed before the interview that he did not have to speak, that he had the right to an attorney, and that his statements could be used against him. And defendant's description of himself as an educated man, who maintained a successful business for eight years leading up to his arrest, indicates that he was fully capable of understanding his rights. Defendant even testified that he had looked up the law and knew he was in trouble before his police interview. Thus, the record supports the conclusion that defendant understood his rights and made a voluntary, knowing, and intelligent decision to waive them before confessing. Again, counsel cannot be faulted for failing to file a meritless motion. *Ericksen*, 288 Mich App at 201.

In his Standard 4 brief, defendant argues that his trial counsel was ineffective because he did not file a motion for discovery so as to introduce evidence that the complainant had made prior false accusations of sexual activity, particularly against an uncle. According to defendant, if his counsel had filed a motion for such discovery, he could have cross-examined the complainant regarding whether she had made prior false accusations and, if she denied making them, used the evidence obtained through discovery to impeach her credibility.

Defendant's argument that the complainant made false accusations against her uncle is undercut, however, by his assertion in his principal brief on appeal that the complainant's uncle was charged, tried, and found guilty for having a sexual relationship with her. Defendant's counsel also argued at the sentencing hearing that the complainant's need for counseling was caused by "other intervening events," referring to her relationship with her uncle. Therefore, no error in judgment on the part of defense counsel is shown.

Defendant also argues in his Standard 4 brief that his trial counsel was ineffective for failing to request a hearing to inquire if the jurors' minds were free from prejudicial impact, where one juror greeted defendant on the third day of trial by saying "Good morning, Mr. Bennett!" However, because defendant fails to explain how he was prejudiced by the alleged greeting or the legal basis upon which his counsel could have used the alleged greeting to inquire into the mindset of the jury, he has not shown that trial counsel's performance fell below an objective standard of reasonableness in deciding not to seek an evidentiary hearing. Furthermore, based on the evidence at trial, including the complainant's testimony and defendant's admissions, there is no reasonable probability that the outcome of this case would have been different had defendant's counsel requested an evidentiary hearing in response to the alleged greeting by one of the jurors.

Accordingly, we hold that defendant was not denied the effective assistance of counsel.

III. EVIDENTIARY RULING

Defendant argues that the trial court abused its discretion during the jury's deliberation by only playing for the jury the three excerpts of the pretextual phone call. During the trial, after ruling that excerpts from the pretextual phone call were admissible, the trial court asked defendant's counsel if he wanted to have any additional portions of the conversation played under MRE 106. Defendant's counsel declined and responded, "Not at this time, your Honor."

During the jury's deliberations, the jury asked to rehear three pieces of evidence: a recording of his interview by the police detective, a recording of his telephone conversation with the victim while he was in custody, and the recorded excerpts of the pretextual phone call which were played during his cross examination. Defendant had no objection to the first two requests by the jury, but asserted that the excerpts of the pretextual phone call should only be played if the jury was also played all of the testimony given by defendant, so that the phone call excerpts would be heard in context.

The trial court overruled defendant's objection, noting that the jury had not requested to hear all of defendant's testimony, but clearly asked for specific pieces of evidence. The trial court further noted that it had offered to play the actual recorded court testimony immediately surrounded the requested excerpts, which would have included the questions asked of the defendant by counsel as well as his answers, and that while defendant had not withdrawn his objection to the trial court's decision not to replay all of defendant's testimony, his stated preference was to simply play only the selected recorded excerpts.

We find no error in the manner in which the trial court handled the jury's request for the playback of evidence. We first note that defendant makes an argument on appeal that he did not make at the trial,[3] that the trial court erred by not playing the entire recording of the conversation between the victim and the defendant. As we have already mentioned, by defendant's stipulation, only the excerpts of the recording became part of the evidence to be considered by the jury. Because defendant stipulated to playing only excerpts of the pretextual phone call to the jury, defendant has waived this already unpreserved issue. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000). With respect to the objection actually raised by defendant to the replaying of the tapes pursuant to the jury's request during deliberation, that the jury should also rehear the entirety of defendant's trial testimony to place the excerpts in context, we again find no error in the trial court's ruling. The trial court provided the jury with what they requested. As such, the trial court did not abuse its discretion. See MCR 2.513(P) (stating that a trial court must exercise its discretion when a deliberating jury requests "certain" evidence); *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996).

[3] Issues not raised below are unpreserved. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382-383; 741 NW2d 61 (2007).

IV. PROSECUTORIAL MISCONDUCT

Defendant next alleges instances of prosecutorial misconduct during the closing arguments. We find no error.

Defendant acknowledges that he did not preserve this issue below. Accordingly, we will not reverse his convictions unless a plain error affected his substantial rights by resulting in his conviction despite his actual innocence or "seriously affecting the integrity, fairness, or public reputation of the judicial proceedings." *People v Jordan*, 275 Mich App 659, 665; 739 NW2d 706 (2007), citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial." *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999). As the Michigan Supreme Court stated in *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995):

> Generally, "[p]rosecutors are accorded great latitude regarding their arguments and conduct." They are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." Nevertheless, prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jury members or express their personal opinion of a defendant's guilt, and must refrain from denigrating a defendant with intemperate and prejudicial remarks. Such comments during closing argument will be reviewed in context to determine whether they constitute error requiring reversal. [Citations omitted.]

Defendant, in his main brief on appeal and his Standard 4 brief on appeal, argues that the prosecutor committed misconduct during closing arguments by stating that defendant was "manipulative" and "conned" the complainant's parents, and by telling the jury, "Don't be the next people that he manipulates or cons." According to defendant, these comments improperly interjected issues beyond defendant's guilt or innocence and accused defendant of fabricating his testimony.

Read in context, it is clear the prosecutor's comments were permissible because they were directed at defendant's credibility. See *People v Buckley*, 424 Mich 1, 15-16; 378 NW2d 432 (1985) (holding that a prosecutor may argue that a defendant fabricated testimony where "the evidence does support that inference"). Prior to making the challenged comment, the prosecutor directly addressed defendant's credibility, noting that during his police interview he confessed that he had sex with the complainant 10 to 20 times, but that at trial he was asking the jury to believe that he never had sex with the complainant and that his confession was part of a plan to avoid jail time. Further, the prosecutor argued that "the evidence is showing you that the defendant is an incredibly manipulative, selfish man." As examples, the prosecutor noted that defendant "conned" his good friends, the complainant's parents, whom he had known since the complainant was born, and "took advantage" of a girl who he knew had a crush on him.

Furthermore, there was evidence to support the prosecutor's arguments that defendant "conned" the complainant's parents, "took advantage" of the complainant's interest in him, and lied when he testified that he never had sex with the complainant. Defendant testified that he was good friends with the complainant's father and knew that the complainant was 14 or 15 years old when she began sending him nude pictures of herself. He further testified that he continued to see the complainant and communicate with her after receiving the nude pictures and that he did not disclose any of this information to her parents, with whom he maintained frequent contact. Through his police interview, his phone call made from jail, and his statements made during the pretextual phone call, there was ample evidence that defendant had unlawful sexual contact with the complainant. Accordingly, the prosecutor's comments were proper.

V. OFFENSE VARIABLES SCORING

Defendant next argues, as he did at the sentencing hearing, that the trial court erred in scoring his offense variables (OVs) 4 and 10. We disagree.

"Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.* "A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *People v Ratkov*, 201 Mich App 123, 125; 505 NW2d 886 (1993). "The contents of the presentence report are presumptively accurate if unchallenged by the defendant." *Id.*

Defendant first argues that the trial court erred in scoring 10 points under OV 4. OV 4 provides for the scoring of 10 points if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). The statute further provides, "Score 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.34(2).

This Court has held that 10 points are properly scored under OV 4 where a victim suffered depression, personality changes, traumatic dreams, anger, hurt feelings, fright, or sleeplessness. *People v Gibbs*, 299 Mich App 473, 493; 830 NW2d 821 (2013); *People v Earl*, 297 Mich App 104, 110; 822 NW2d 271 (2012), lv gtd on other grounds 828 NW2d 359 (2013).

Defendant argues that the complainant did not suffer serious psychological injury requiring professional treatment because her May 2010 counseling was, upon information and belief, prompted by her sexual relationship with her uncle. However, the complainant's May 2010 counseling is not dispositive of this issue because the record supports the conclusion that she suffered serious psychological injury requiring professional treatment and in fact sought treatment, after the May 2010 counseling. At the sentencing hearing, the complainant stated that she suffered "overwhelming emotions" as a result of defendant's conduct, which were manifested in crying, worrying, pain, and an inability to sleep without medications, and that she sought counseling as a result of those problems. Furthermore, the presentence investigation

report (PSIR) states that the complainant "has suffered emotional problems as a result of this offense, and has been involved in counseling to address those problems since approximately October 2010." Based on this evidence, the trial court did not err scoring 10 points under OV 4.

Defendant also argues that the trial court erred in scoring 15 points under OV 10. OV 10 provides for the scoring of 15 points where "[p]redatory conduct was involved" in "the exploitation of a vulnerable victim." MCL 777.40(1)(a). "'Predatory conduct' means preoffense conduct directed at a victim for the primary purpose of victimization," MCL 777.40(3)(a). This encompasses only "those forms of 'preoffense conduct' that are commonly understood as being 'predatory' in nature, e.g., lying in wait and stalking, as opposed to purely opportunistic criminal conduct or 'preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequent escape without detection.'" *People v Huston*, 489 Mich 451, 462; 802 NW2d 261 (2011), quoting *People v Cannon*, 481 Mich 152, 162; 749 NW2d 257 (2008). And "[v]ulnerability," under the statute, is defined as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c). Thus, in order to score 15 points under OV 10, a defendant must have engaged in predatory, preoffense conduct directed at a victim with a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation for the primary purpose of victimization. *Huston*, 489 Mich at 458-460.

The trial court stated that scoring 15 points under OV 10 was appropriate because defendant exploited the complainant's youth, abused his status as a person she was babysitting for, and engaged in preoffense conduct directed at her for the primary purpose of victimization. The trial court did note, however, that defendant "didn't engage in predatory conduct by grooming her to engage in these acts." Defendant takes this comment to mean that the trial court concluded that defendant did not engage in predatory conduct and, therefore, erred in scoring 15 points under MCL 777.40(1)(a), which requires predatory conduct.

Defendant's argument is unavailing. The trial court's statement cited by defendant does not mean that the trial court found an absence of predatory conduct; it simply means that the trial court determined that defendant did not engage in "grooming" predatory conduct.[4] Indeed, immediately before making the challenged comment, the trial court specifically stated that defendant "engaged in pre-offense conduct" directed at the complainant "for the primary purpose of victimization," which fits the statutory definition of "predatory conduct." See MCL 777.40(3)(a).

And the record supports the conclusion that defendant's actions prior to the unlawful penetrations involved more than run-of-the-mill planning. The record contains evidence that defendant gained exclusive access to the complainant—at his house—by taking advantage of his close friendship with her father and orchestrating for her to babysit at his house. Then, according to the complainant's testimony, defendant waited until his son went to bed before he went into the room she was in, where he first sexually assaulted her.

[4] Predatory conduct can include "grooming," which "refers to less intrusive and less highly sexualized forms of sexual touching, done for the purpose of desensitizing the victim to future sexual contact." *People v Steele*, 283 Mich App 472, 491-492; 769 NW2d 256 (2009).

Finally, the record supports the conclusion that the complainant was a vulnerable victim. In *Cannon*, 481 Mich at 158, the Michigan Supreme Court stated that factors to consider in determining whether a victim is vulnerable include "the victim's youth," "the existence of a domestic relationship," and "whether the offender abused his or her authority status," but that "[t]he mere existence of one of these factors does not automatically render the victim vulnerable." Here, there was evidence that defendant's predatory conduct began when the complainant was 14 years old and defendant was 37 years old, that he gained access to the complainant through his close friendship with her father, and that he took advantage of a position of trust to initiate the first incident of kissing and sexual touching. Furthermore, the record shows that the complainant sent defendant nude pictures of herself before the unlawful penetrations, making it readily observant to defendant that she was susceptible to temptation and injury. Based on this evidence, the record supports the conclusion that the complainant was a vulnerable victim. Accordingly, the trial court did not err in scoring 15 points under OV 10.

VI. SENTENCING DEPARTURE

Next, defendant argues that the trial court abused its discretion in departing from the minimum-sentence range recommended by the sentencing guidelines. We disagree.

"Under MCL 769.34(3), a minimum sentence that departs from the sentencing guidelines recommendation requires a substantial and compelling reason articulated on the record." *People v Smith*, 482 Mich 292, 299, 305; 754 NW2d 284 (2008). "[T]he reasons relied on must be objective and verifiable," and "[t]hey must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention." *Id*. The trial court must also state on the record the reasons for the departure. MCL 769.34(3).

"In determining whether a sufficient basis exists to justify a departure, the principle of proportionality . . . defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed." *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). "For a departure to be justified, the minimum sentence imposed must be proportionate to the defendant's conduct and prior criminal history." *Smith*, 482 Mich at 300. A trial court may not "base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b).

"On appeal, courts review the reasons given for a departure for clear error." *Smith*, 482 Mich at 300. "The conclusion that a reason is objective and verifiable is reviewed as a matter of law." *Id.* "Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure." *Id.* "A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes." *Id.*

Defendant argues that the trial court abused its discretion in imposing a minimum sentence 10 months in excess of the sentencing guidelines recommendation based on multiple penetrations where OV 13 already scored 25 points for a crime involving "a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777. 43(1)(c). Despite

defendant's assertion, the trial court adequately articulated substantial and compelling reasons to deviate from the guidelines range. The court explained that the guidelines did not adequately consider that there were as many as 20 penetrations, that defendant lied many times during trial, which negatively affected the complainant and caused her additional emotional distress, and that defendant violated a position of trust as a basis to plan and execute his series of crimes. Here, there was objective and verifiable evidence, based on defendant's admissions, that there were as many as 10 to 20 penetrations which took place over the course of six months. As the Michigan Supreme Court has held, "sexual abuse occur[ing] over a long period is an objective and verifiable reason for departure." *Smith*, 482 Mich at 301.

Further, this Court has held that a defendant's perjury during trial constitutes an objective and verifiable factor that can support an upward departure when the defendant admits during sentencing that their trial testimony was false, although the Court has stated that a defendant's perjury cannot, by itself, justify a departure from the guidelines. *People v Kahley*, 277 Mich App 182, 188; 744 NW2d 194 (2007). During trial in this matter, defendant testified numerous times that he never had sexual contact or penetrations with the complainant and said he never sent her nude pictures of himself. But in asking for leniency at sentencing, defendant's attorney explained that defendant "made a horrible decision to engage in a sexual relationship with somebody who was not of age to engage in a sexual relationship."

While defendant argues that the multiple penetrations were adequately considered under OV 13, that variable only contemplates scoring 25 points for a pattern of felonious criminal activity involving a minimum of three crimes. MCL 777.43(1)(c). Thus, the trial court did not err in concluding that the magnitude of defendant's conduct was given inadequate weight by the sentencing guidelines, and it did not abuse its discretion in making an upward departure. Moreover, the 10-month upward departure was proportionate to the offense and the offender.

VII. CRUEL OR UNUSUAL PUNISHMENT

Next, defendant argues that his sentence was cruel and unusual, contending that the minimum-sentence range recommended by the sentencing guidelines was more than sufficient punishment for defendant's conduct. We disagree. By failing to raise this issue with the trial court, defendant did not preserve this issue for appellate review. See *People v Metamora Water Service, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Accordingly, we will not reverse his sentence in the absence of a plain error affecting his substantial rights. *Carines*, 460 Mich at 763-764.

"[A] proportionate sentence does not constitute cruel or unusual punishment." *People v Drohan*, 264 Mich App 77, 92; 689 NW2d 750 (2004); see also *Miller v Alabama*, __ US __; 132 S Ct 2455, 2463; 183 L Ed 2d 407 (2012). Defendant argues that his sentence, which departed upward from the sentencing guidelines, was not proportionate to his offenses and therefore constituted cruel and unusual punishment. However, for the reasons discussed in Part VI of this opinion, the trial court's 10-month departure was proportionate. Accordingly, defendant's sentence was not cruel or unusual.

VIII. PSIR

Finally, defendant complains that the trial court granted his request to make certain changes to the PSIR at the sentencing hearing, but that the Michigan Department of Corrections (MDOC) provided him with a copy that did not contain the corrections ordered by the trial court. Plaintiff concedes that the PSIR should be amended to accurately reflect the changes ordered by the trial court at the time of sentencing. We agree that the ordered changes to the PSIR did not occur. Therefore, we remand to the trial court for correcting the PSIR.

IX. CONCLUSION

Affirmed, but remanded for the limited purpose of ensuring that the trial court prepares a corrected copy of the PSIR, which reflects the changes ordered at sentencing, and transmits the corrected copy to the MDOC in accordance with MCR 6.425. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder
/s/ Amy Ronayne Krause